Petition

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT KITE, AS NEXT FRIEND OF GREG KITE, AND DEL HARRIS, INDIVIDUALLY AND AS NEXT FRIEND OF LARRY HARRIS AND ALEX HARRIS,
Petitioners,

v.

BAILEY MARSHALL AND THE UNIVERSITY INTERSCHOLASTIC LEAGUE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD L. NATIONS
3000 Post Oak Boulevard
Suite 1480
Houston, Texas 77056
(713) 960-9690
Attorney for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

I. WHETHER THE FIFTH CIRCUIT ERRED IN FAILING TO RECOGNIZE FAMILY PRIVACY AS A PENUMBRAL FIRST AMENDMENT RIGHT.

II. WHETHER THE FIFTH CIRCUIT MISAPPLIED THE RATIONAL BASIS TEST IN RESTRICTING RIGHTS AFFORDED BY FAMILY PRIVACY.

III. WHETHER THE RULE SET OUT BY THE UNIVERSITY INTERSCHOLASTIC LEAGUE IS CONSTITUTIONALLY OVERBROAD AND ENCROACHES ON RIGHTS PROTECTED BY THE FIRST AMENDMENT.

CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record, certifies that the following listed persons and government entities have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Name:

ALEX HARRIS ..... Petitioner
DEL HARRIS ..... Petitioner
LARRY HARRIS ..... Petitioner
GREG KITE ..... Petitioner
ROBERT KITE ..... Petitioner

BAILEY MARSHALL, Director of the University Interscholastic League, and Member of the Executive Committee, Individually and in his official capacity ..... Respondent

UNIVERSITY INTERSCHOLASTIC LEAGUE ..... Respondent

UNIVERSITY INTERSCHOLASTIC LEAGUE EXECUTIVE COMMITTEE, LYNN F. ANDERSON, BETTY THOMPSON, RAY WILLIAMS, LYNN W. McGRAW, and WILLIAM FARNEY, each individually and in his official capacity ... Respondents

JERRY S. WILLIAMS, Chairman of the University Interscholastic League Legislative Council and Member of the Executive Committee, Individually and in his official capacity .... Respondent

Respectfully submitted,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, ROBERT KITE, As Next Friend of GREG KITE, and DEL HARRIS, Individually and As Next Friend of LARRY HARRIS and ALEX HARRIS pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 20, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was reported at 661 F.2d 1027 (5th

Cir. 1981) and appears in Appendix "A". The opinion rendered by the District Court for the Southern District of Texas was published at 494 F.Supp. 227 (S.D. Texas 1980), and appears in Appendix "B". The Findings of Fact and Conclusions of Law rendered by the District Court for the Southern District of Texas, in which the Petitioners were granted relief in the form of a Temporary Injunction, was reported at 454 F.Supp. 1342 (S.D. Texas 1978) and appears in Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on November 20, 1981, and appears in Appendix "A".

Petitions for rehearing and en banc consideration, after decision and opinion by the Court of Appeals, were denied on December 23, 1981. A copy of the Order Denying the Petition for Rehearing and En Banc Consideration by the United States Court of Appeals for the Fifth Circuit appears in Appendix "D".

This Court's jurisdiction is invoked under Title 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Ninth and Fourteenth Amendments to the Constitution of the United States appear in Appendix "E"; 28 U.S.C. 1254(1) (1966), 28 U.S.C. Sec. 1343(a)(3) (West Supp. 1982), 28 U.S.C. Sec. 1331 (West Supp. 1982), 42 U.S.C. Sec. 1983 (1981), appear in Appendix "F"; and Article VIII, Sec. 21 of the *Constitution and Contest Rules of the University Interscholastic League* appears in Appendix "G".

STATEMENT OF THE CASE

Respondent, the University Interscholastic League (UIL herein) is an association of Texas public schools which functions as a part of the Division of Continuing Education of the University of Texas. It is governed by a nine-member state executive committee appointed by the President of the University of Texas. A legislative council comprised of twenty superintendents and principals formulates policies and guidelines for the state executive committee. The conduct of the affairs of the UIL has been held by the United States Court of Appeals for the Fifth Circuit to constitute state action. *See Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973).

Petitioner Del Harris, is Head Coach of the Houston Rockets in the National Basketball Association. In that role, he has participated as a coach in a number of summer self-improvement athletic training camps conducted throughout the United States for the benefit of America's youthful athletes. A life-long association with high school, college and professional athletic programs has made Petitioner Harris a firm believer in the important role which interscholastic athletic competition plays in molding the character of the participant by helping the athlete gain self-confidence, learn to win with humility and lose with grace, learn self-discipline and achieve other self-motivational skills. Through his association with the summer athletic camps, Petitioner Harris has seen that these self-improvement camps are a complement to and a valuable adjunct of the interscholastic competition programs and are a desirable tool in the educational process of America's children.

As a Head Coach of a team of professional athletes with consummate levels of skill, Harris is acutely aware

of the importance played by the psychological and motivational aspects of the competition, i.e., the character of the team. Through a lifetime of athletic participation on a daily basis, Harris observes that the interscholastic high school training programs tend to teach the basics of the game and the methods and importance of teamwork while the summer improvement camps tend to emphasize the motivational, psychological and inspirational aspects of the game. Petitioner Harris strongly feels that the important disciplines acquired through both participation in interscholastic athletic competition and attendance at the motivational summer camps are important to the character development of his children. Accordingly, the Harris family desires to have their children attend a week-long basketball camp during the summer and participate in their high school's varsity basketball competition in the fall. Despite the fact that the Harris family feels that both the high school competition and summer programs are important to their children's education and character development, they are denied the use of one of these valuable child developmental tools by virtue of a regulation adopted only in the State of Texas by the University Interscholastic League which renders high school varsity competition and participation in summer camp mutually exclusive. Petitioners seek to have this UIL regulation declared unconstitutional as being violative of their First and Fourteenth Amendment penumbral right of family privacy.

The regulation at issue renders high school students ineligible to participate in interscholastic varsity football, basketball or volleyball competition for a period of one year as a penalty for attending a self-improvement athletic training camp in one of these three sports for one week

during the summer. Inexplicably, the rule does not apply to athletes who attend self-improvement summer camps in baseball, softball, track and field, cross-country, swimming, golf or tennis. Nor does it apply to elementary, middle school, junior high school or junior varsity high school athletes. The UIL has singled out from those within its jurisdiction only the high school athletes participating in varsity football, basketball and volleyball for this highly discriminatory ruling.

In 1978, Petitioner Robert Kite, enrolled his son, Greg Kite, in a one-week summer basketball camp and sought federal injunctive relief to prevent the UIL from disqualifying Greg from his senior year of interscholastic varsity basketball competition. The Federal District Court for the Southern District of Texas held the regulation in question unconstitutional and enjoined the UIL from penalizing Greg with one full year of ineligibility for his one week of summer basketball camp activities. On Greg's graduation from high school, the Kites were non-suited and Del Harris intervened on behalf of his two sons who were in the same position. The Federal District Court granted the same injunctive relief to Petitioner Harris.

The undisputed facts are that athletic self-improvement training camps, generally of a one-week duration, are held for high school students throughout the United States during summer months. While a few camps are very selective and invite athletes solely on the basis of ability, the vast majority of the camps are open to any young person who registers and pays the required fees or qualifies for scholarship or financial aid. The camps are conducted for the student athletes by professional, college and high school coaches, assisted by professional and college athletes. As a parent, Petitioner Harris chooses

to have his sons participate in the program as student athletes do in the other forty-nine states without the sanction of losing one year of high school varsity eligibility, as under the UIL rule. The training camps register young high school athletes of various ages, racial and ethnic backgrounds, financial and social status and draw from every level of interscholastic competition within the United States. Petitioner Harris and his family simply desire that his children be afforded the same advantages for the use of these educational and inspirational camps as are available to high school athletes without sanction in every state except Texas.

In one week, the duration of most camps, it is difficult to materially increase a student's skills in a given sport. Thus, the thrust of the training program is designed to imbue the student with an increased enthusiasm, positive thinking, self-motivation and self-discipline with respect to an individual training technique program which he may practice on his own and teach to his teammates and friends. The result is an increased desire to participate and excel in the sport and a proliferation of the self-improvement techniques among high school varsity students everywhere except in Texas. It is axiomatic that these acquired motivational skills often carry over into other aspects of the young athlete's life, including his school work, college competition and career goals.

The student is also afforded the opportunity to learn different styles of training techniques from professional, college and high school coaches and athletes and actively compete against fellow high school athletes from all levels of competition. His performance is evaluated and critiqued by high level coaches and athletes with individual attention given to methods of self-improvement.

The opportunities which these camps offer to an individual student from a small Conference B school, for example, include a chance to compete against students from all levels up to the large Conference AAAA schools. Students also receive personal instruction from college and professional coaches and athletes and gain valuable exposure to college coaches, thereby increasing their own opportunities for a college scholarship. For many of the underprivileged, their athletic skills and exposure to college coaches provide the best route out of poverty and into a college education and possibly a professional career in athletics, either as a player or a coach.

The UIL apparently feels that the perceived evils of summer motivational camps outweigh the obvious good, at least with respect to high school varsity athletes in basketball, football and volleyball. Inexplicably, these same evils seem not to affect junior varsity and younger players in sports other than these three. Ironically, the groups of athletes chosen as targets for the severe penalty under the UIL's discriminatory ruling are those it professes to protect. Clearly, more black and underprivileged athletes achieve a college education and professional athletic careers in basketball and football than in golf, tennis and the other sports which the UIL controls. However, if the parents of a black high school varsity basketball player in Texas choose to send him to a summer motivational training camp for one week and thereby increase his exposure to college coaches and his chances for a college scholarship, the child is severely penalized by loss of one year of varsity eligibility and the concomitant loss of any chance of a scholarship. Additionally, high school varsity basketball players from every other state in the Union have the option to come to camp with the college

coach and gain the exposure plus the built-in advantage for scholarship opportunities over the Texas player. Petitioners desire to have the right of broadening their children's character development, and choosing their educational and vocational opportunities reinstated where it constitutionally belongs, in the hands of the family.

While all fifty states have summer athletic camps, significantly, Texas is the only state to penalize its high school varsity athletes in this manner. The facts leading to the adoption of the rule provide some basis for an understanding of the Respondent's misguided position.

Prior to 1962, there was no control of any nature exercised by the UIL over athletes in the summer athletic camps. In 1961, an ambitious high school basketball coach in Dallas took his team to a camp in Colorado for an entire summer of training together. The team won the State Championship, much to the chagrin of the UIL. In a classic paradigm of bureaucratic overreaction, the UIL, instead of going to the source of the problem by controlling the coaches, passed the rule in question which effectively punishes the innocent high school student who pursues this method of self-improvement during his free time in the summer.

Of the fifty states, only Texas adopted this stringent method. The other forty-nine states handle the relationship between interscholastic athletics and summer athletic camps more moderately by (a) no regulation, (b) not allowing a coach to work with members of his own team, or (c) limiting the number of members of the same team who can train together in the same summer camp. More moderate approaches adopted by other states prevent the problem which precipitated the Texas overreaction with-

out unduly punishing America's aspiring youthful athletes. The unnecessarily overbroad nature of the UIL rule is the subject of one of Petitioner's points herein.

I. THERE EXISTS A FUNDAMENTAL RIGHT OF FAMILY PRIVACY WHICH DERIVES ITS STATUS FROM THE PENUMBRA OF THE FIRST AND FOURTEENTH AMENDMENTS.

The Fifth Circuit erred in this case in totally failing to recognize the continuing viability of the Family Choice Doctrine despite the repeated pronouncements of this Court on the subject.

Petitioners assert that the UIL rule is unconstitutional in that it is in direct contravention of Petitioners' First Amendment penumbral right of family privacy, as reserved to the people by the Ninth Amendment, which is protected by the Fourteenth Amendment from infringement by the States.

A. Family Privacy Is A Recognized Liberty Interest Guaranteed By The Fourteenth Amendment.

The right of family privacy, known as the Family Choice Doctrine, had its genesis in the opinion of Justice McReynolds in *Meyer v. Nebraska*, 262 U.S. 390 (1923), wherein this Court acknowledged the common law right of parents to control the lives of their children and the "natural duty of the parent to give his children education according to their station in life." *Id.* at 400.

Meyer taught German in a Lutheran parochial school in Nebraska and was convicted of violating a state law proscribing the teaching of a foreign language to any

child who had not completed the eighth grade. After acknowledging the right to establish a home and to bring up children as one of the "liberty" guarantees of the Fourteenth Amendment, this Court held that the parents had the constitutional right to engage the teacher to instruct their children, and the state could not interfere under the guise of protecting the public interest. Justice McReynolds stated: "Evidently, the Legislature has attempted materially to interfere with . . . the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Id.* at 401.

Petitioners assert that the present case is analogous in that the parents have the right to engage the personnel in summer camps to instruct their children. The UIL should not be permitted to materially interfere with the opportunities of pupils to acquire knowledge and with the power of parents to control the education of their own.

Subsequently, in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), this Court held unconstitutional an Oregon statute requiring parents to send their children only to public schools. Justice McReynolds, writing for the Court, further solidified the Family Choice Doctrine as a Fourteenth Amendment right in stating that the statute was an unreasonable interference with the liberty of parents to direct the education and upbringing of their children. Of direct significance to the case at Bar is the following language:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his

> destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations. *Id.* at 535.

The State of Texas seeks to standardize its high school varsity athletes by forcing them to accept instruction from school coaches only. The parents of Texas' youthful athletes enjoy the same right, coupled with the high duty, to recognize and prepare their children for additional obligations as those espoused by this Court in *Pierce.*

This Court next alluded to the liberty of the family to be protected against state encroachment in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158 (1944) wherein Justice Rutledge, citing *Meyer* and *Pierce,* characterized the firm state of the Family Choice Doctrine in the following language:

> It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. *Id.* at 166.

B. Later Supreme Court Analysis Extends Family Privacy Into The Protection Of The First Amendment.

However, the most penetrating analysis of the constitutional right of family privacy came in the multiple opinions of this Court in *Griswold v. State of Connecticut,* 381 U.S. 479 (1965). The issue which precipitated the analysis was the constitutionality of a Connecticut statute which proscribed the use of contraceptives. In explicitly reaffirming the family privacy principle of the *Meyer* and

Pierce cases, the majority opinion, per Justice Douglas, recognized the right to educate one's children as one chooses as a First and Fourteenth Amendment right. In discussing *Meyer,* Justice Douglas stated: "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"; which is precisely what the UIL rule attempts to do herein.

The Court discusses its holding in *NAACP v. State of Alabama,* 357 U.S. 449 (1958), to acknowledge that the "freedom to associate and privacy in one's own associations" is a penumbral First Amendment right and then states that "the First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. Thus, the Family Privacy Doctrine which had previously been promulgated as a "liberty" guarantee under the Fourteenth Amendment is given further efficacy as a penumbral First Amendment right.

In a concurring opinion, Justice Goldberg analyzes the effect of the Ninth Amendment on the "liberty" protected by the Fifth and Fourteenth Amendments and concludes that "liberty" is not restricted to rights specifically mentioned in the first eight Amendments, but extends to those rights which are of such a character that they cannot be denied without violating the fundamental principles of liberty and justice. After a penetrating analysis of the origin of penumbral rights, Justice Goldberg states that "the right of privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we live." *Id.* at 494.

Thus, under the constitutional guarantees of family privacy, Petitioners aver that the UIL rule which con-

tracts the spectrum of available knowledge and infringes upon Petitioner Harris' right to direct the education and upbringing of his children should be declared unconstitutional.

Despite the foregoing assertions and reiterations by this Court of the Family Choice Doctrine and the asserted constitutional role of the parent vis-a-vis the state in responsibility for family decisions regarding the education and upbringing of the child, the Fifth Circuit effectively abrogated the doctrine in this case. This is a valid reason for granting certiorari herein.

II. WHEN DEALING WITH A FUNDAMENTAL RIGHT, THE STATE MUST SHOW A COMPELLING INTEREST IN ORDER TO RESTRICT THAT RIGHT, NOT MERELY A RATIONAL PURPOSE.

The law is clear and unequivocal to the effect that where certain fundamental rights are involved, state regulation limiting these rights may be justified only by a compelling state interest and that legislative enactments must be drawn to express only the legitimate state interest at stake. *Roe v. Wade,* 410 U.S. 113 (1973). It is equally clear from the foregoing review of the Family Choice Doctrine that this Court has consistently held family privacy to be such a fundamental right.

The Fifth Circuit has confused the term fundamental right with absolute right, by stating that there is uncertainty regarding family privacy as a fundamental right because it "falls short of being constitutionally absolute." *Kite v. Marshall,* 661 F.2d 1027 (5th Cir. 1981).

Based on the lack of absoluteness, the Fifth Circuit concluded that there is no fundamental right of family privacy and held that there was no necessity for the state to demonstrate a compelling state interest in order to uphold the UIL rule. This reasoning is in total contravention of this Court's decision in *Roe v. Wade, supra,* wherein the Court, per Justice Blackmun, acknowledges that while the right of privacy is a fundamental right, it cannot be said to be absolute. Despite the lack of absoluteness, this Court then proceeds to test the Texas statute in question in terms of a compelling state interest.

By way of analogy, the fault in the Fifth Circuit's argument may be demonstrated. Freedom of speech is a fundamental First Amendment right. Certainly no one would argue that this right is absolute. For example, the exercise of one's freedom of speech in the public forum is subject to reasonable time, place and manner restrictions. *Cox v. State of New Hampshire,* 312 U.S. 569 (1941); *Cox v. Louisiana,* 379 U.S. 536 (1965). While not absolute, these restrictions by no means eliminate free speech as a fundamental right. Likewise, the fundamental right of family privacy, a penumbral First Amendment right, is not absolute, but it is certainly still a fundamental right. Based on this erroneous conclusion, the Fifth Circuit applied the rational basis test instead of the compelling state interest test which is to be utilized when the state seeks to regulate a fundamental right.

Clearly the Fifth Circuit erred in not recognizing the right of family privacy as a fundamental right and in not testing the UIL ruling against the compelling state interest.

III. THE UIL RULE IS CONSTITUTIONALLY OVERBROAD, AND THE UIL CAN ACHIEVE ITS OBJECTIVES BY TAILORING THE RULE AND THEREBY AFFORDING A LESS RESTRICTIVE MEANS OF ENFORCEMENT.

A. The Impact Of Constitutional Overbreadth Is Set Forth In *Shelton v. Tucker*, 364 U.S. 479 (1960), And Illustrates That Valid State Objectives Must Be Achieved By The Least Restrictive Means.

Once a fundamental right to family choice or family privacy under the First Amendment is found, the State is then duty bound to tailor their relevant statutes as narrowly as possible to specifically address the perceived evil over which regulation is sought. This is the substance of "constitutional overbreadth" as expressed in *Shelton v. Tucker*, 364 U.S. 479 (1960).

In *Shelton*, a schoolteacher was required to submit a list of all associations and organizations to which she had been a member for the preceding five years. Her refusal to submit to the statute was upheld by the Supreme Court even though the Court recognized that the state had a valid justification in discovering the associations to which a public schoolteacher was a member. The gravamen of the majority opinion was that the statute swept too broadly, taking along with it activity in which the state could and could not engage. If the state desired to achieve its valid objectives, it must do so by the least restrictive alternative, by precisely tailoring the statute to address the perceived evils. The court recognized the goal of the state of Arkansas in ensuring competence, but held that the legislation was overbroad in achieving that purpose.

The court reasoned that the "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488.

B. The Analysis In *Shelton* Is Applicable To The Far-reaching Rule Of The UIL.

As in *Shelton,* the objectives to be attained by the UIL rule are easily recognizable. Certain of the aspirations of the UIL are positive. Other states have also recognized the importance of these goals, and in order to assure their fruition, these states have enacted regulations on camp attendance by players and coaches by limiting the number of students per team who may attend and not allowing a coach to attend camp with his own players.

However, Texas is the only state having such a harsh rule that disallows attendance subject to loss of varsity eligibility for one year. This UIL rule is overbroad and usurps the fundamental right of parents to direct the education of their children.

As previously discussed, the overbroad UIL rule was a reaction to an entire Dallas basketball team and its coach attending a camp for the majority of the summer. In the preliminary injunction hearing concerning this rule, Judge Cowan stated:

> The evidence in this case reveals that, largely through historical accident, there is virtually no rational relationship between the rule in question and the legitimate objectives of promoting fair competition and preventing overemphasis on sports. It is completely clear from the evidence that the legitimate objective of discouraging overemphasis upon basketball, and creating an atmosphere of fair competition, may be

> achieved by less restrictive, less broad rules, which do not impinge fundamental constitutional rights. *Kite v. Marshall*, 454 F.Supp. 1347, 1351 (1978).

Comparable to promoting competence in *Shelton*, there is a legitimate interest of the UIL to promote fairness and to keep athletics in perspective. However, the means employed by the UIL to bring about this end are too oppressive and infringe on constitutionally protected rights. There is no reason to employ a punitive reprimand of a one year suspension from competition on a young person who attends a summer camp in the hopes of bettering himself when the UIL could simply regulate the attendance without prohibiting it. This is the very type of extreme regulation that *Shelton* addresses, one that sets out to promote a worthy objective, but exceeds its limits by eroding constitutional freedoms.

It is beyond dispute that such activities are, as in the case at Bar, educational. Who then, other than the parents, is to decide what educational experiences are proper for their children during the summer months, absent a compelling state interest? If it is the bureaucratic machinery of the state, will other wholesome, worthwhile summer activities, such as music, speech, drama camps, and literary and academic contests which are also under the jurisdiction of the UIL be similarly proscribed? What right has the state to interfere with such activities? Will the state next seek to regulate the vacation plans of high school students? Such questions clearly accentuate the need for this Court's review. The decision by the Court of Appeals has jeopardized the family's constitutionally guaranteed right to make these decisions.

Finally, with respect to the nature of the rule in question, common sense would dictate that if forty-nine other

states handle the UIL's perceived problems concerning the interplay between the summer camps and interscholastic varsity competition without the harsh penalties inherent in the Texas rule, then surely Texas can function with a less restrictive rule.

From a constitutional point of view, the UIL should have no choice since the test of the parameters of the rule is "precision" as Justice Goldberg stated in *Griswold, supra,* at 498. The constitution clearly requires that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Such precision of regulation is lacking in the UIL rule in question herein and therefore provides a valid reason for review of this case on certiorari.

Despite the unequivocal nature of these holdings, the Fifth Circuit totally failed to protect Petitioners' constitutional right and follow prior decisions of this Court in the following regards: (a) the Fifth Circuit failed to recognize the fundamental nature of the right of privacy; (b) the Fifth Circuit failed to apply the "compelling interest" test to the state's action herein, and (c) the Fifth Circuit failed to require that the UIL rule be narrowly drawn to express only the state's legitimate interest at stake. This discussion of these errors in light of clear prior holdings of this Court establishes clearly that certiorari should be granted to correct the erroneous holding of the Fifth Circuit.

IV. THE FIFTH CIRCUIT HAS MISSTATED THE ISSUES BEFORE THE COURT.

The constitutional issue for determination by this Court is whether the UIL rule constitutes a significant encroach-

ment upon the Petitioners' First and Fourteenth Amendment right of family privacy. If so, the state may prevail only upon showing a subordinating interest which is compelling. If not, the rule is unconstitutional.

The Fifth Circuit totally failed to perceive this issue, ignored the First Amendment penumbral rights of the Petitioners and effectively abrogated the Family Choice Doctrine. Thus, Petitioners assert that this is sufficient reason for this Honorable Court to grant certiorari herein.

The best example of how widely the Fifth Circuit missed the mark on discerning the constitutional issues is indicated in the Court's own perception stated as follows:

> Reduced to essentials, the legal questions posed are: (1) whether parents possess a fundamental right to send their children to summer athletic camps; and (2) whether the children have a constitutional right to attend such activities. As is frequently the case, in the very postulation of the question the answer lies. *Kite v. Marshall,* 661 F.2d 1027 (5th Cir. 1981).

No one in this case has argued that there is or is not a fundamental right to send a child to summer camp. However, Petitioners agree completely with the reasoning in the final sentence of the lower Court's opinion, i.e., the Court improperly postulated the question and accordingly arrived at an erroneous conclusion. It must be emphasized that the right advanced by the Petitioners is the right of a family to make decisions essential to the welfare of its members encumbered by the state only when there is a compelling state interest. *Prince v. Massachusetts,* 321 U.S. 158 (1944). Petitioners are not, and have never argued that there is a fundamental right to attend basketball camp. These parental rights must be stressed with

emphasis, for it is the parental right which is a constitutional right and not the child's right to play or not to play varsity basketball.

Petitioners argue that there is a fundamental right of family choice or family privacy which permits parents to direct the education of their children. The parents are asserting this right in challenging the UIL rule. The Fifth Circuit oversimplified the Petitioner's arguments and held that a fundamental right does not exist to send one's child to *basketball camp.* They found a rational purpose for the UIL rule based on the supposed issue of a right to attend camp. However, the true issue before the Court concerns the fundamental right of family privacy which protects the rights of the parent to direct a child's education and upbringing restricted only when the state can demonstrate a compelling interest, not merely a rational purpose.

V. THE CASES RELIED ON BY THE FIFTH CIRCUIT THAT PURPORTEDLY CREATE UNCERTAINTY REGARDING THE FUNDAMENTAL RIGHT OF FAMILY PRIVACY, ARE DISTINGUISHABLE FROM THE PRESENT CASE.

As previously discussed, to be fundamental, a right does not have to be absolute. Restrictions may be imposed on a fundamental right. The Fifth Circuit has cited these cases that supposedly create an aura of uncertainty around the Family Choice Doctrine which renders it not absolute. Even if these cases restricted family privacy, they would not make the right any less fundamental. However, the authorities cited by the Fifth Circuit can additionally be distinguished from the present case.

The Fifth Circuit relies on *Runyon v. McCrary,* 427 U.S. 160 (1976) for the proposition that parents have

no constitutional right to educate their children in private segregated schools. However, the case in fact said that parents do have the constitutional right to send their children to schools that advocate racial segregation, but that these schools may not exclude racial minorities based on the family privacy right. In essence, *Runyon* states that racial minority parents have the same constitutional right to educate their children in these schools advocating racial segregation as do white parents. Instead of proscribing rights based on family privacy, the case is affording these rights to minorities.

The Fifth Circuit has inappropriately relied on *Ingraham v. Wright*, 430 U.S. 651 (1977), as an abrogation of the family choice doctrine. *Ingraham* deals with parental involvement in corporal punishment of the child while at school. The issue discussed in *Ingraham* involves the liberty interest in personal security protected by the Fourteenth Amendment. *Ingraham* is not concerned with the right of family privacy.

The third case relied on by the Fifth Circuit is *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In this case, the Court is not minimizing the parents' rights to raise the child by not requiring parental consent in the case of minor females seeking abortions. The Court is merely recognizing the rights of the females themselves in controlling their own bodies. In fact, this case derives its lifeblood from *Roe v. Wade*, 410 U.S. 113 (1973), which recognized the penumbral right of privacy inherent in the First Amendment.

CONCLUSION

There are five compelling reasons why certiorari should be granted in this case, all traceable to the initial error

of the Fifth Circuit in failing to recognize Petitioners' First and Fourteenth Amendment penumbral rights: (1) The Fifth Circuit erred in failing to recognize the viability and applicability of the Family Choice Doctrine; (2) the Fifth Circuit erred in failing to test the actions of the State against the compelling interest rule; (3) the Fifth Circuit erred in failing to properly perceive the constitutional issue herein; (4) the Fifth Circuit erred in virtually ignoring this Court's case precedent on the Family Choice Doctrine; and (5) the Fifth Circuit erred in not requiring the State to narrow the constitutionally overbroad rule. For these reasons, Petitioners respectfully request that this Honorable Court grant the Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HOWARD L. NATIONS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to counsel for Respondents herein, Robert W. Gauss, Assistant Attorney General, State of Texas, P. O. Box 12548, Austin, Texas 78711, on the 21st day of April, 1982, certified, return receipt requested, with the proper postage thereon.

HOWARD L. NATIONS

Appendix

APPENDIX A

661 F.2d 1027 (5th Cir. 1981)

Robert KITE, as next friend of
Greg Kite, Plaintiff,
Dell Harris, as next friend of Larry
Harris, et al., Intervenors-Appellees,

v.

Bailey MARSHALL, Individually and as
Director, University Interscholastic League,
et al., Defendants-Appellants.

Robert H. LACKNER, Individually and
as next friend of Mark Lackner,
Plaintiff-Appellee,

v.

Bailey MARSHALL, Individually and as
Director, University Interscholastic League,
et al., Defendants-Appellants.

No. 80-1847.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.*

Nov. 20, 1981.

Parents brought action challenging constitutionality of "summer camp rule" adopted by Texas interscholastic league. The United States District Court for the Southern

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452--October 14, 1980.

District of Texas, George E. Cire, J., 494 F.Supp. 227, held that the rule was unconstitutional. Interscholastic league appealed. The Court of Appeals, Politz, Circuit Judge, held that the rule of the Texas interscholastic league which suspends for one year the varsity athletics eligibility of any high school student who attends certain training camps does not violate either the due process or equal protection clauses of the Fourteenth Amendment.

Judgment reversed.

Appeals from the United States District Court for the Southern District of Texas.

Before BROWN, GEWIN** and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

These consolidated actions challenge the validity of Section 21 of Article VIII of the Constitution and Contest Rules of the University Interscholastic League (UIL) of Texas. The challenged section suspends for one year the varsity athletics eligibility of any high school student who attends certain training camps.[1] The district court,

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** Due to his death on May 15, 1981, Judge Gewin did not participate in this decision; the case is being decided by a quorum. 28 U.S.C. § 46(d).

1. Article VIII, Section 21, provides:

Training Camps Forbidden.—Any student who attends a special athletic training camp in football or basketball shall be ineligible for a period of one year from the date he enrolls in the camp for any athletic contest in the League. This does not apply to *bona fide* summer camps giving an over-all activity program to the campers or students.

This section has been amended to limit the ineligibility to the sport involved in the special training.

494 F.Supp. 227, enjoined the enforcement of section 21 and subsequently declared the rule unconstitutional as applied. We reverse.

[1] UIL is a voluntary, non-profit association of public schools below collegiate rank in the State of Texas. It functions as an integral part of the Division of Continuing Education of the University of Texas at Austin. Its stated objective is "to foster among the public schools of Texas interschool competitions as an aid in the preparation for citizenship." In pursuit of this goal, UIL promulgates rules and regulations governing various aspects of competition in speech, journalism, literary and academic contests, drama, music and athletics. Although a private organization, UIL's functioning constitutes state action subject to the limitations of the fourteenth amendment to the Constitution. *See, e.g., Walsh v. Louisiana High School Athletic Ass'n.*, 616 F.2d 152 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981). We must determine whether section 21 violates either the due process or equal protection clause of that amendment.

The district court found section 21 to be constitutionally infirm because it infringed protected parental authority in the child-rearing arena. Appellees exhort us to affirm the trial court's conclusions, principally relying on the "family choice doctrine" which has its genesis in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). We cannot accept the invitation.

The *Meyer* and *Pierce* decisions are based on the premise that the state has no power to "standardize its chil-

dren," *Pierce v. Society of Sisters,* 268 U.S. at 535, 45 S.Ct. at 573, or to "foster a homogeneous people," *Meyer v. Nebraska,* 262 U.S. at 402, 43 S.Ct. at 628, by foreclosing the opportunity of individuals "to heed the music of different drummers." L. Tribe, *American Constitutional Law,* § 15-6, at 903 (1978). In a thoughtful analysis of *Meyer* and *Pierce,* Professor Tribe opined:

> One subsequent explanation of their joint import has been that they demontrated judicial solicitude for the Catholics in Oregon and the Germans in Nebraska against whom the invalidated statutes had evidently been directed because of the inability of those groups adequately to safeguard their interests through the political processes of their states. That notion is worth stressing as illustrative of a general technique—that of assessing alleged invasions of personhood in their historical and social context. . . . A rule that might be sustained as a proper expression of community interest were it to affect the population as a whole might thus be invalidated as a violation of personality when it operates to single out, if not to submerge, a distinct group in the society.

L. Tribe, *supra,* § 15-6, at 904 (footnotes omitted) (*citing United States v. Carolene Prods. Co.,* 304 U.S. 144, 152-53 n.4, 58 S.Ct. 778, 783-84, 82 L.Ed. 1234 (1938)). Such concerns are not present in the matter now before us.

Appellees cite as controlling precedent a line of Supreme Court decisions[2] which purportedly recognize the

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2. *See Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (striking a city ordinance prohibiting certain extended families from residence in the city); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (state could not force the Amish to comply with compulsory education laws by sending their children to school beyond the eighth grade); *Pierce*

existence of a "private realm of family life which the state cannot enter," *Prince v. Massachusetts,* 321 U.S. at 166, 64 S.Ct. at 442, absent compelling reasons. Uncertainty abounds, not only as to the constitutional spring from which this family privacy right flows, but also as to its definition and character.

Recent decisions by the Supreme Court declaring that parents have no constitutional right to educate their children in private segregated academies, *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), or to demand approval before the administration of corporal punishment in school, *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), or to exercise an absolute veto power over a minor child's decision to terminate a pregnancy via abortion, *Planned Parenthood v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), clearly signal that parental authority falls short of being constitutionally absolute. Confronted with these situations which, at first blush, appear to rest at the heart of parental decision making, the Supreme Court refrained from clothing parental judgment with a constitutional mantle.

The instant case presents a similar inquiry. Reduced to essentials, the legal questions posed are: (1) whether parents possess a fundamental right to send their children to summer athletic camps; and (2) whether the children have a constitutional right to attend such activities. As is frequently the case, in the very postulation of the ques-

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v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (invalidation of state law forbidding attendance at private schools); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (striking of state statute prohibiting the teaching of foreign languages).

tions the answer lies. A negative response to both questions is mandated. This case implicates no fundamental constitutional right.

The determination that no fundamental right to participate in summer athletic camp exists establishes the level of scrutiny to which we must subject section 21. The regulation will pass constitutional muster if it is found to have a rational basis.

Due Process

[2] The UIL contends that its rules are designed to make competition among its 1,142 member schools as fair and equitable as possible. The UIL program, including the athletics component, is only a part of the overall educational process. Several reasons are advanced in support of section 21, including the need to control overzealous coaches, parents and communities, the achieving of a competitive balance between those who can afford to attend summer camp and those who cannot, the avoidance of various excessive pressures on students, and the abrogation of the use of camps as recruiting mechanisms.

It cannot be argued seriously that section 21 is wholly arbitrary and totally without value in the promotion of a legitimate state objective. We do not evaluate the ultimate wisdom, *vel non,* of section 21, or the sagacity of its methodology. The school authorities have concluded that section 21 serves the purpose of making interscholastic athletics fairer and more competitive. We are not prepared to say that section 21 bears no meaningful relationship to the achievement of that ideal. The due process clause of the fourteenth amendment has not been offended. *See City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Ferguson v. Skrupa,* 372

U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Equal Protection

[3, 4] Traditionally, the equal protection analysis has been performed against the backdrop of the standards of strict scrutiny and minimum rationality. To withstand strict scrutiny, a statute must necessarily relate to a compelling state interest. *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). The rational basis test requires only that the legislation or regulation under challenge rationally promote a legitimate governmental objective. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).[3]

[5, 6] A state action viewed under the rational basis banner is presumed to be valid. In such a situation, "the burden is not upon the state to establish the rationality of its restriction, but is upon the challenger to show that the restriction is wholly arbitrary." *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972) (en banc). Accordingly, only when a demonstration is made that the classification contained in the regulation is wholly arbitrary or does not teleologically relate to a permissible governmental objective is the equal protection clause violated. When "the classification created by the regulatory scheme neither trammels fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest." *Walsh v. Louisiana High School Athletic*

3. For a recent comparison of strict scrutiny, rational basis and the developing intermediate level of examination, *see Seoane v. Ortho Pharmaceuticals*, 660 F.2d 146 (5th Cir. 1981).

Ass'n, 616 F.2d 152, 160 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 939, 67 L.Ed.2d 109 (1981) (*citing Parham v. Hughes*, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Jackson v. Marine Exploration Co.*, 583 F.2d 1336 (5th Cir. 1978)).

[7] In view of the Supreme Court's prevailing opinions and our decisions in *Walsh and Parish v. National Collegiate Athletic Association*, 506 F.2d 1028 (5th Cir. 1975), we believe that the minimum rationality test provides the guide for our equal protection evaluation. *See Denis J. O'Connell High Sch. v. Virginia High Sch. League*, 581 F.2d 81 (4th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979); *Moreland v. Western Pa. Interscholastic, etc. League*, 572 F.2d 121 (3d Cir. 1978).

[8] Admittedly section 21 operates to treat student-athletes who attend summer athletic camps differently from those students who do not. The former lose eligibility in all varsity sports for the next year. But the categorization is not premised on impermissible, suspect grounds. Nor does the classification impinge upon the exercise of fundamental rights. The rule seeks to achieve a balance in interscholastic athletics. It is not unconstitutional.

The judgment of the district court, in these consolidated cases, is REVERSED.

APPENDIX B

Robert KITE, as next friend of Greg Kite,
Plaintiff,

Rudy Tomjanovich and David W. Cowens' Basketball School, Inc., and Del Harris, as next friend of Larry Harris and Alex Harris,
Intervenors,

v.

Bailey MARSHALL, Individually and as Director, University Interscholastic League; Jerry S. Williams, Individually and as Chairman, University Interscholastic League; Lynn F. Anderson, Betty Thompson, Ray Williams, Lynn W. McGraw, and William Farney, each Individually and as members of the Executive Committee, University Interscholastic League,
Defendants.

Robert H. LACKNER, Individually and as next friend of Mark Lackner,
Plaintiff,

v.

Bailey MARSHALL, Individually and as Director, University Interscholastic League; Jerry S. Williams, Individually and as Chairman, University Interscholastic League; Lynn F. Anderson, Betty Thompson, Ray Williams, Lynn W. McGraw, and William Farney, each Individually and as members of the Executive Committee, University Interscholastic League; Raul Besteiro, Jr., Superintendent of the Brownsville Independent School District; Raul Saenez, Chairman of the District Executive Committee 16-AAA of the University Interscholastic League, and its other members,
Defendants.

B-2

Civ. A. Nos. H-78-1171, H-80-313.

United States District Court,
S. D. Texas,
Houston Division.

July 18, 1980.

Parents brought action challenging constitutionality of "summer camp rule" adopted by defendant university interscholastic league. The District Court, Cire, J., held that: (1) conduct of affairs of UIL constitute state action; (2) parents' decision to send their child to summer basketball camp is important enough to warrant constitutional protection under the family's fundamental right of personal privacy; and (3) since only legitimate compelling state interest applicable was the control of coaches, the regulation was broader in scope and effect than needed to further such interest and was unconstitutional.

Judgment for plaintiffs.

Dean H. Steffey, Houston, Tex., for plaintiff.

David C. Garza, Brownsville, Tex., for plaintiff/intervenors.

Robert Gauss, Asst. Atty. Gen., Austin, Tex., for defendants.

MEMORANDUM AND ORDER

CIRE, District Judge.

This action presents a constitutional challenge to the "summer camp rule" adopted by the Defendant University Interscholastic League (UIL). Subject matter juris-

diction exists pursuant to 28 U.S.C. § 1343(3). The Plaintiffs ask this Court to hold Article VIII, Section 21 of the UIL's Constitution and Contest Rules unconstitutional. That rule provides:

> "*Training Camps.*—Any student who attends a special athletic training camp in football, basketball, or volleyball shall be ineligible for a period of one year from the date he enrolls in the camp in the sport or sports for which he attended the camp. This does not apply to *bona fide* summer camps giving an overall activity program to the participants."

The action was filed in 1978 by Robert Kite, as next friend of Greg Kite. Preliminary injunctive relief was entered restraining the UIL from enforcing its summer camp rule against Greg Kite. *Kite v. Marshall,* 454 F.Supp. 1347 (S.D. Tex. 1978). Interventions were allowed the following year by Del Harris, as next friend of Larry and Alex Harris, and similar injunctive relief was afforded to them. Subsequently, an identical action was filed in the Brownsville Division of this District by Robert Lackner, as next friend of Mark Lackner, and they also obtained protection from enforcement of the rule in question. The Brownsville action has been transferred to this Court and consolidated with the Kite and Harris action. Also before the Court are Rudy Tomjanovich and Dave Cowens' Basketball School, Inc., as intervenors.

The testimony in this case was confined to basketball and the facts are largely undisputed. Specialized basketball training camps for high school youth are held throughout the country during the summer months. A camp will usually last for one week. Some camps are geared toward the exceptionally talented basketball player and are at-

tended by invitation only. Most camps are open to any young person who registers and pays the enrollment fee. The camps offer intensive training in the fundamentals of basketball and provide ample opportunity for competition and practice. The participants learn and play under the supervision of experienced coaches. In addition to training in basketball, they are exposed to youths from varying racial and ethnic backgrounds and receive discipline in terms of curfew rules, a training schedule, and supervision. Camp attendees meet and associate with new friends from diverse backgrounds.

[1] Defendant UIL is a voluntary, non-profit association of public schools which functions as an integral part of the Division of Continuing Education of the University of Texas. All public schools in Texas are eligible for membership in the UIL. Its highest governing body is a nine-member State Executive Committee appointed by the President of the University of Texas. A Legislative Council, composed of twenty superintendents and principals elected regionally by fellow administrators, formulates policies to guide the State Executive Committee. At the local level, the governing body of the UIL is a District Executive Committee which is made up of school superintendents or their designates. The conduct of the affairs of the UIL clearly constitutes state action. *Walsh v. Louisiana High School Athletic Assn.*, 616 F.2d 152 (5th Cir. 1980); *Saenz v. University Interscholastic League*, 487 F.2d 1026 (5th Cir. 1973).

All UIL Constitution and Contest Rules are promulgated after input from parents, coaches, principals, and school superintendents. The summer camp rule was initially passed in 1962 and was slightly revised in 1979 after a referendum prompted by this action. The rule came

about in direct response to a situation created by the attendance of a Dallas high school basketball team with their coach for an entire summer at a camp in Colorado, after which the team won a state championship. As it is the purpose of the UIL to coordinate and regulate interscholastic competition among member schools, the rule was first directed toward ensuring that high school athletes and member schools compete on a reasonably equal basis. The continued existence of the rule is, according to the UIL, also necessary to keep athletics in its proper perspective in the total high school educational program. The rule is specifically intended to eliminate excessive pressures on students to attend summer camps. The direct source of this pressure is the coaches who are themselves pressured by an overemphasis on winning exerted by parents, the community, and the news media. The UIL is thus indirectly regulating the conduct of high school coaches by making any player who attends a summer camp ineligible to compete the following year on a varsity team.

All parties in this lawsuit have expressed their main objective to be the enhancement of the total educational environment and development of high school students. The UIL Defendants believe that specialized athletic summer camps must be controlled or they can have a detrimental effect on the overall athletic/educational background of a student. The Plaintiffs, on the other hand, feel that the summer camp experience is an important facet in a child's development.

The Court has heard testimony that some camps offer a well-supervised and balanced program while others promise to deliver something they cannot. There are coaches with high ideals who consider the best interests

and total development of their athletes to be their primary goal. There are, however, other coaches who value winning over all other aspects of an athletic program, causing them to succumb to the outside pressures placed upon them to do so and who, in turn, pressure their young athletes to overemphasize a sport. There are parents who guide their youngsters responsibly and there are parents who are unduly swayed by promises from camps and coaches to make their child a "superstar." The UIL feels that the summer camp rule is a necessary and appropriate means to protect high school youth from deceptive summer camps, overzealous coaches, and well-intentioned, but misled, parents.

The Plaintiffs advance, as their primary argument, a constitutional right in the family unit to decide what is best for the family and, in particular, what is appropriate and in the best interests of the minor children of the family. This right, they maintain, is found in the "family choice doctrine," described by the Plaintiffs as a fundamental right to family choice or family privacy recognized as a penumbral right under the First Amendment. Under this right, the parents feel that it is their prerogative to decide to enroll their children in specialized basketball camps during the summer. They object to the UIL rule because it, in effect, requires them to forfeit either the discipline, social interaction, and fellowship flowing from a summer basketball camp, or the self-esteem and confidence that follow young people who compete for their varsity school teams.

The Right

[2] Freedom of personal choice in family matters is one of the liberties protected by the Due Process Clause

of the Fourteenth Amendment. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed. 2d 52 (1974). The early cases of *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), recognized that the liberty protected by the Due Process Clause has "some extension to activities relating . . . to child rearing and education." *Roe v. Wade,* 410 U.S. 113, 152-153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). This right of "personal privacy" includes "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977).

[3] The roots of the right of personal privacy have been found in various Amendments, most notably the First, Fourth and Fifth, in the "penumbras of the Bill of Rights" and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). As the right of personal privacy applies to the family, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York,* 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968).

[4] The First Amendment is most intimately involved in this family aspect of privacy in educational matters. In *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. The Supreme Court has reaffirmed this principle, noting

that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* 381 U.S. 479, 482 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965). Therefore, a fundamental constitutional right exists to protect the integrity of the family and family decisions from unwarranted intrusion by the state. See also *Parham v. J. R.,* 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed. 2d 797 (1979); *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct 1208, 31 L.Ed.2d 551 (1972).

[5, 6] A discussion on the rights of a parent and the family should not overlook the fact that children themselves have constitutionally protectible interests and are "possessed of fundamental rights which the State must respect." *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969). In *Tinker,* the Supreme Court made it clear that the right of students to be treated as " 'persons' under our constitution" exists in school as well as during the time spent out of school. More importantly for purposes of this analysis *Tinker* recognized that the educational development of a student goes beyond the classroom and that "personal intercommunication among the students" is both inevitable and important. 393 U.S. at 511-514, 89 S.Ct. at 739-740.

[7] Finally, this Court must find that the decision to send a child to summer basketball camp is important enough to warrant constitutional protection under the

family's fundamental right of personal privacy. *Carey v. Population Services International,* 431 U.S. 678, 684, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). It has historically been recognized that natural bonds of affection lead parents to act in the best interests of their children. *Parham v. J. R.*, 442 U.S. 584, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101 (1979). The Plaintiff-parents in this action have expressed their belief that interscholastic athletics involve education in that experience is educational. They believe that their children benefit from meeting and interacting with other children and adults in that they are able to develop self-confidence and enhance their ability to cooperate with others. It cannot be denied that a child's development into a mature, responsible citizen is facilitated when he or she can grow in a healthy environment of competition, cooperation, fellowship, and understanding. This Court must focus on the importance of that environment and its educational attributes rather than on the relative worth of a particular basketball camp in terms of what it offers toward improvement of basketball skills. The Supreme Court has recently stated:

> ". . . an additional and more important justification for state deference to parental control over children is that '[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). 'The duty to prepare the child for additional obligations . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.' *Wisconsin v. Yoder,* 406 U.S. 205, 233, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972). This affirmative process of teaching, guiding, and inspir-

> ing by precept and example is essential to the growth of young people into mature, socially responsible citizens."

Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 3045, 61 L.Ed.2d 797 (1979). It is, therefore, the conclusion of this Court that the summer camp decision which the Plaintiffs here seek to reserve for themselves as parents is both important and deserving of constitutional support.

The Infringement

Having found a fundamental constitutional right, the remaining inquiries are whether or not the UIL rule in question infringes that right and, if so, whether the rule is motivated by "compelling state interests" and has been "narrowly drawn to express only [those] interests." *Roe v. Wade,* 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed. 2d 147 (1973). The UIL vigorously protects any assertion that its summer camp rule prohibits a student from attending a camp or a parent from sending him to one. Defendants maintain that the only "consequence naturally flowing" from sending a child to camp is the forfeiture of eligibility to compete in varsity interscholastic athletics for one year. Defendants look to *Walsh v. Louisiana High School Athletic Assn.,* 616 F.2d 152 (5th Cir. 1980), as support for their position that their summer camp rule imposes no burden on parental choice.

The *Walsh* case involved a challenge to a rule which prohibited eligibility for interscholastic athletic competition for a one-year period to any student who matriculated at a high school outside of his home district after completing elementary or junior high school. The rule affected the eligibility of any student who attended a Lutheran elementary or junior high school and desired to attend a

Lutheran high school because the only Lutheran high school in the area in question was located outside the home districts of the Lutheran elementary and junior high schools. The Fifth Circuit held that the transfer rule merely placed an "indirect and incidental" burden on the free exercise of the religious beliefs of the parents and that such burden was not an "impermissible price to exact from these parents." In support of this holding, the Court of Appeals found that the transfer rule neither prohibited a parent from enrolling his child in a Lutheran high school nor interfered with the child's ability to obtain the religious education provided by that school.

The transfer rule in *Walsh* was in no way directed toward impeding the free exercise of religion and the fact that it had some effect on that right was incidental to its purpose. The summer camp rule is, however, directly and purposefully aimed at discouraging a specific parental decision made during the summer months when the school is not acting *in loco parentis*. The interference posed by the UIL rule on that decision is neither indirect nor incidental. Exacting a penalty from a child's attendance at a summer camp constitutes a significant interference with the exercise of a parent's right to make this decision when he or she feels it to be in the best interest of his or her child.

[8, 9] Defendants correctly point out that the right to participate in interscholastic athletics is not a fundamental constitutional right and it falls outside the protection of due process. *Walsh v. Louisiana High School Athletic Assn.*, 616 F.2d 152 (5th Cir. 1980); *Mitchell v. Louisiana High School Athletic Ass'n.*, 430 F.2d 1155 (5th Cir. 1970). However, this case does not involve a violation of a right to play a sport. Ineligibility for interscho-

lastic athletics is part of the penalty imposed on parents for deciding to send their child to summer basketball camp. There are other penalties involved. While an ineligible student may still work out with the team, his ineligibility precludes him from competing on an equal basis with his fellow students. Ineligibilty also means that for the prescribed period of time a student may not endeavor to achieve success in this area and feel the rewards that it brings, and may not participate in a cooperative team activity and experience the fellowship it involves. These penalties interfere with the right of a family to make educational and developmental decisions for their minor children and not with any right to participate in athletics.

[10] While the values of parental direction of the education of their children have a high place in our society, the State also has a great responsibility for the education of its citizens and may impose reasonable regulations for the control and duration of basic education. *Wisconsin v. Yoder,* 406 U.S. 205, 213-214, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972). The final inquiry is, then, whether the rule being challenged is both motivated by a compelling state interest and has been narrowly drawn to express only that interest. *Roe v. Wade,* 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973).

[11] The UIL contends that its constitutionally permissible objective is to regulate the educational process, including interscholastic athletics, in an efficient and fair manner. Certainly, this interest is legitimate and compelling. More specifically, the UIL offered proof at trial to show that if summer camps were permissible, students and parents would be subjected to the pressure of enrolling their children in these specialized camps from

coaches who feel pressure to win from the community or who have a desire to further their own economic interest by promoting these camps. Concern was also expressed regarding the possibility that the camps might be used by coaches for recruitment purposes. To regulate the conduct of these coaches, the UIL imposes a penalty on the student for his attendance.

Avoidance of peer pressure was also asserted as a legitimate reason for the summer camp rule. Regulation in this area could be never-ending. All teenagers are confronted with peer pressure of one type or another. This is one of the realities of what we know as "growing up" and it is the responsibility of parents, not the state, to cope with the problems related to these pressures.

[12] The UIL presented testimony from high school coaches who expressed concern that if summer camps were left unregulated, they would create a situation where only children from more economically advantaged homes could attend. There are many variables present in this situation. The cost of attending a summer camp differs with each camp and many students earn their own enrollment fee. Sometimes scholarships are available. More importantly, however, limiting the opportunities that a family can offer its offspring to only those things that all families can afford is itself an unreasonable restriction on the family's right to make educational decisions for its minor children.

[13-15] Therefore, the only legitimate "compelling state interest" applicable here is the control of the coaches and, in the opinion of this Court, the UIL has enacted a regulation which is broader in its scope and effect than it needs to be to further the interests involved. A state may regulate in the area of First Amendment freedoms only

with "narrow specificity." *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Statutes that affect constitutional rights must be drawn with "precision" and must be "tailored" to serve their legitimate objectives. *Dunn v. Blumstein,* 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274. (1972).

The UIL has failed to show that it is without any other reasonable way to achieve its goals. It presently has the most restrictive rule of any other state with a rule of this nature. The summer camp rule does not appropriately confront the problem caused by overzealous coaches. It does not regulate with the requisite "narrow specificity" to accomplish its purpose of controlling the activities of coaches and thereby promoting fair athletic competition and a balanced educational environment. This Court agrees with Judge Cowan's earlier discussion on this issue found in *Kite v. Marshall,* 454 F.Supp. 1347, 1350 (S.D. Tex. 1978). As it presently reads, the summer camp rule constitutes an overbroad and unreasonable infringement on the right of a family to make decisions concerning the education of its children.

Conclusion

The constitutional right of the Plaintiffs, encompassed by the right of family privacy, to make educational decisions for their children is substantially burdened by Article VIII, Section 21 of the Constitution and Contest Rules of the University Interscholastic League. The challenged rule has not been narrowly drawn to express the UIL's interest and it is, therefore, hereby declared unconstitutional.

The motions of the UIL to dismiss Intervenor Rudy Tomjanovich and David W. Cowens' Basketball School,

Inc., for lack of standing, and Plaintiff Robert Kite, as next friend of Greg Kite, on grounds of mootness, are hereby GRANTED.

Judgment shall be entered for Plaintiff/Intervenor Del Harris, as next friend of Larry Harris and Alex Harris in Civil Action No. H-78-1171, and Plaintiff Robert Lackner, as next friend of Mark Lackner, in Civil Action No. H-80-313.

It is so ORDERED.

APPENDIX C

Robert KITE, as next friend of Greg Kite,
Plaintiff,

Rudy Tomjanovich, and David W. Cowens
Basketball School, Inc.,
Intervenors,

v.

Bailey MARSHALL, Director, etc., Jerry S. Williams,
Chairman, etc., other members of the University
Interscholastic League Executive Committee,
etc. and Billy Reagan, etc.,
Defendants.

Civ. A. No. H-78-1171.

United States District Court,
S. D. Texas,
Houston Division.

July 27, 1978.

Civil rights action was brought by high school basketball player and his parents challenging rule of interscholastic league providing that students who played in special basketball training camps were ineligible for one year for any athletic contest in the league. The operator of a training camp intervened. The District Court, Cowan, J., held that: (1) player and his parents were entitled to preliminary injunction restraining league from enforcing its rule against player, where it appeared that rule was overbroad and player and parents would suffer material harm if preliminary injunctive relief were denied, but that league could obtain full relief either on appeal or on trial on the merits, and (2) although it appeared that intervenor's

claim was meritorious and that intervenor would probably succeed in trial of case on merits, where intervenor did not show that he would be irreparably damaged if preliminary relief were not granted, such relief would be denied.

Decree accordingly.

Dean H. Steffey, Buddy W. Gregory and N. John Hellums, Houston, Tex., for plaintiff Kite.

Charles Robertson and Carl M. Weisbrod, Dallas, Tex., for intervenors.

Kelly Frels and Pat Fry, Houston, Tex., for defendant Billy Reagan.

Robert W. Gauss, Asst. Atty. Gen., Austin, Tex., for defendants UIL.

REASONS FOR INJUNCTION; FINDINGS OF FACT AND CONCLUSIONS OF LAW

COWAN, District Judge.

Introduction

The Court has determined that Greg Kite and his parents are entitled to a preliminary injunction pending trial on the merits against all of the defendants. The injunction will restrain the defendants from the enforcement, as to Greg Kite, of Article VIII Section 21 of the Constitution and Contest Rules of the University Interscholastic League (hereinafter UIL) which provides:

Sec. 21. *Training Camps Forbidden.*

—Any student who attends a special athletic training camp in football or basketball shall be ineligible for a period of one year from the date he enrolls in the camp for any athletic contest in the League. This does not apply to *bona fide* summer camps giving an over-all activity program to the campers or students.

The reasons for this decision and instructions concerning the form of the decree are set out herein.

Jurisdiction

The jurisdiction of the Court, and hence the responsibility of the Court to address this controversy, arises from R.S. § 1979 codified at 42 U.S.C. § 1983, which reads:

> Every person who, under color of any statute, or ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdiction of the Court is also based upon 28 U.S.C. § 1331, § 1343(3) and (4).

[1] UIL, an association of governmental entities, clearly performs its functions under color of state law. *See Bucha v. Illinois High School Ass'n,* 351 F.Supp. 69 (N.D. Ill. 1972); *Mitchell v. Louisiana High School Ass'n,* 430 F.2d 1155 (5th Cir. 1970); *Oklahoma High School Ass'n v. Bray,* 321 F.2d 269 (10th Cir. 1963); *Reed v. Ne-*

braska School Ass'n, 341 F.Supp. 258 (N.D. Neb. 1972); *Hennessey v. National Collegiate Athletic Ass'n,* 564 F. 2d 1136 (5th Cir. 1977); *Saenz v. University Interscholastic League,* 487 F.2d 1026 (5th Cir. 1973).

Basic Facts

The essential facts are exceptionally simple and compelling. Greg Kite is a superb high school basketball player and an all-A student. He is 6′11″ tall and regarded by some sports commentators as being one of the finest high school basketball players in the United States. Currently he is in the summer vacation between his junior and senior years. He is interested in playing professional basketball, if qualified, and in a medical career specializing in that branch of medicine which explores, treats and does research in the relationship of the functioning of bones and muscles together. He has worked during the summer and has saved the approximately $150-$200 necessary to attend a one-week "Superstars" basketball camp in which he will have an opportunity to play twenty or more games against other very large, very talented players under the supervision of several eminent coaches. Recruiting is not permitted at this camp. In this one week he will have an opportunity to play more basketball against other 7′ tall (approximately) players than during an entire year in regular competition. The opportunity to play in this camp is very important for his development and also important in enabling him to determine if he is as promising a player as his present experience would indicate.

Greg Kite also desires to continue to play basketball for Madison High School in his senior year, and, from the standpoint of both his education and career, it is very

important that he do so. This opportunity is very important because his senior year performance will have great significance in determining whether and what type of college scholarship he can obtain. A college scholarship is important because Greg's father is not financially able to pay all of Greg's college expense at some of the colleges which he might elect to attend and because of the enormous cost of a premedical and a medical education.

Greg's parents are anxious for him to attend the "Superstars' camp" and believe that their fundamental rights are infringed by the challenged UIL rule. The rule in Greg Kite's case basically prohibits Greg from attending the Superstars' basketball camp for one week during his summer vacation.

The rule in question is unique—Texas is the only one of the 50 states with a rule as broad and prohibitory as the one here in issue.

Constitutional Rights Involved

[2] *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) and their progeny illustrate that under our Constitution there is a body of rights which are inherent in and properly left to the family—not to the state. *Pierce, supra,* involved the inviolate right of the family to educate its children in private—rather than public—schools. *Meyer, supra,* involved the right of the family to provide, through a school, instruction in the German language. The right of Greg Kite's family to assist him in developing to the fullest his extraordinary talent is just as inviolate as the rights of the parents in *Pierce, supra* and *Meyer, supra.*

Justice Rutledge has aptly stated in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, at 166, 64 S.Ct. 438, at 442, 88 L.Ed.2d 645, at 652, that:

> . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters,* supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

[3] Also relevant here are the fundamental rights, guaranteed by our Constitution, of citizens to pursue and prepare themselves for lawful professions, and to choose their own associates. See *Truax v. Raich,* 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Griswold v. State of Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed2d 510 (1965) and many similar cases.

Our federal judiciary has repeatedly said that students and teachers do not lose their fundamental constitutional rights at the school house door. *Tinker v. Des Moines Ind. School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed.2d 731 (1969); *Goss v. Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975); *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961); *Stapp v. Avoyelles Parish School Board,* 545 F.2d 527 (5th Cir. 1977). A student and his family certainly should not lose these fundamental rights during a summer vacation, when the state's legitimate interest in a student's activities is greatly diminished and where the conduct in question has no relationship to the school's legitimate interest in creating an orderly learning environment. See reasoning in *Shanley v. Northeast Ind. School District,* 462 F.2d 960 (5th Cir. 1972).

[4, 5] Before the state or its instrumentalities may properly infringe upon a constitutionally protected right, the state must at the very least show some rational relationship between the rule which infringes the constitutional rights and the object to be achieved by the rule in question. This Court does not in any degree challenge or question the good faith or credibility of Dr. Marshall, Dr. Williams, Mr. Tusa, or anyone associated with any of the defendants; however, the evidence in this case reveals that, largely through historical accident, there is virtually no rational relationship between the rule in question and the legitimate objectives of promoting fair competition and preventing over-emphasis on sports. It is completely clear from the evidence that the legitimate objective of discouraging over-emphasis upon basketball, and creating an atmosphere of fair competition, may be achieved by less restrictive, less broad rules which do not impinge fundamental constitutional rights. The undisputed evidence reveals that while many states regulate attendance at summer athletic camps, none adopt the Texas approach of effectively prohibiting attendance for talented athletes who need scholarships.

The rule challenged here was, counsel for Greg Kite properly argues, an over-reaction to a specific problem. In 1963 Jefferson High School basketball team spent a substantial part of the summer in Colorado, with their regular coach, in constant practice. Predictably, Jefferson's team the following year was exceptionally good. The rule here challenged was promulgated in a good faith effort to meet the specific problem of the Jefferson High School Colorado summer. In other states the problem of the "Colorado summer" is dealt with by rules which provide that not more than two athletes from the same school

may attend the same camp, or by a rule that an athlete who attends summer camp may not be coached by his or her regular high school coach at a summer camp. The injunction which this Court will issue here, even if affirmed on appeal or continued at the trial on the merits, should not be construed as preventing UIL from adopting either of the rules described in the last sentence, or any other rule (consistent with the constitutional rights of the students and parents) reasonably related to the proper goals of creating fair competition and discouraging overemphasis upon any one sports activity.

The late Chief Justice Warren wisely states in *United States v. Robel,* 389 U.S. 258, at 265, 88 S.Ct. 419, at 424, 19 L.Ed.2d 508, at 515 (1967) that:

> It has become axiomatic that 'precision of regulation must be the touchstone in an area so closely touching upon our most precious freedoms.'

Certainly the right of a family to make decisions concerning the education of its own children is one of our most precious freedoms. The right of an individual to develop his talents to the utmost is one of our most precious freedoms. The fact that Texas is the only one of the 50 states which has adopted a rule as broad, pervasive and prohibitory as the Texas rule here under challenge is almost conclusive proof of fatal deficiency in that precision of regulation which is the touchstone where fundamental rights are involved. The challenged regulation, in Justice Warren's language, therefore suffers from "the fatal defect of overbreadth . . ." See 389 U.S. at 266, 88 S.Ct. at 425.

The regulation in the Court's view, does fall afoul of the broadness doctrine but is not vague—it can reason-

ably be interpreted and the Kite family understands its meaning.

The most persuasive reasons for denying relief are set forth in Dr. Marshall's memorandum of June 30, 1978 to member school administrators (see Intervenor's Exh. No. 2). Dr. Marshall is, without question, correct that the rule in question here should be changed by educators and not by the courts. Then Justice, now Attorney General, Bell has wisely stated that the courts are not competent to run the schools, see *Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975); however, we simply cannot lose sight of the fact that public schools in our society are state instrumentalities. The statutes of our Congress, and the cases decided by our Supreme Court, impose upon the federal judiciary the duty of intervening if actions of governmental entities infringe constitutional rights and persons with standing properly challenge these infringements. It is this Court's strong hope that, now that this problem has been brought to the attention of the defendants, the problem will be solved without further court intervention. Certainly it is not unprecedented for a governmental entity to render a controversy of this nature moot by voluntary amendment of a probably unconstitutional statute. See *Robinson v. Kimbrough*, 540 F.2d 1264 (5th Cir. 1976).

Balancing of Factors in Connection with Grant of Preliminary Injunction

The balancing of the probable harm to the parties is the most important factor in the Court's thinking. The Court must balance the harm which will be suffered by the Kite family if relief is denied, against the inconvenience and harm, if any, to the defendants in the event

relief is granted. The balancing task here is easy. Plaintiffs will suffer material harm if relief is denied. Extraordinary talent is rare. Greg Kite has extraordinary talent. Depriving the Kite family of any opportunity to develop Greg's superb talent fully is a severe deprivation.

This Court's decree, pending trial of the case on the merits, causes no damage or inconvenience to the defendants. If defendants are correct that the rule in question will pass constitutional muster (and with all respect to the defendants, this Court has determined preliminarily at least that the defendants are not correct), defendants can obtain full relief either on appeal or upon trial of this case on the merits. The opportunity which Greg Kite wishes to take advantage of, however, must be seized now or it is irretrievably lost.

Public interest is never served by a state's depriving an individual of a constitutional right. Public interest is never served by depriving a talented individual of his right to develop his talents to the utmost.

Analysis of State Cases

Three state cases arguably support the defendants' position. They are: *Texas High School Gym Ass'n v. Andrews,* 532 S.W.2d 142 (Tex. Civ. App.—San Antonio, 1975); *Art Gaines Baseball Camp v. Houston,* 500 S.W.2d 735 (Mo. App.—St. Louis, 1973); and *Brown v. Wells,* 288 Minn. 468, 181 N.W.2d 708 (1970).

The *Andrews* case is distinguishable, not applicable or not persuasive here for several reasons, to wit:

1. The defendants did not act or purport to act under color of state law in that case. The gym coaches

association was not a state agency. Northeast Independent School District, which was of course a state agency, did not attempt to defend the rule in issue, but stated in open court that it supported the plaintiff's view that the rule was invalid.

2. Judge Cadena's opinion gave no consideration to the problem of whether the rule in issue deprived the plaintiffs of their fundamental rights protected by the United States Supreme Court in *Pierce, supra,* and *Meyer, supra.*

3. There was apparently no showing that the plaintiff in the *Andrews* case was a potential professional whose fundamental right to pursue training useful to his future occupation was impinged.

4. *Andrews* is a plea of privilege case, which in Texas jurisprudence has traditionally not been afforded great precedential value because plea of privilege cases are generally not reviewable by the Supreme Court of Texas.

The rule upheld in the *Art Gaines* case was a much more reasonable, rational rule. The rule there—like the rules in the other 49 states—would not prevent Greg Kite from attending the one week camp which he wishes to attend. The opinions in *Art Gaines* and *Brown,* like the opinion in *Andrews,* contain no analysis of the fundamental rights guaranteed by the Bill of Rights to our United States Constitution.

Other Federal Authority

Mitchell v. Louisiana High School Ass'n, 430 F.2d 1155 (5th Cir. 1970) and *Parish v. North Collegiate*

Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975) also arguably support the defendant's position; but, in the Court's view, do not control here. The rules there challenged did not needlessly impinge fundamental constitutional rights and were reasonably related to legitimate state objectives. More applicable here, in the Court's view, is *Louisiana High School Athletic Ass'n v. St. Augustine High School,* 396 F.2d 224 (5th Cir. 1968) where the Court held that where a fundamental right or a suspect classification was in issue, the right to participate in interscholastic athletics becomes a constitutionally protected right.

Intervenor's Claim for Preliminary Injunctive Relief

[6] In the Court's view, intervenor's claim is meritorious and intervenor will probably succeed in the trial of the case on the merits; however, intervenor has not shown that he will be irreparably damaged if preliminary injunctive relief is not granted. For this reason the Court's decree should be limited to granting relief to Greg Kite and his family. Intervenor's Texas basketball camp for this summer has already been held, and it is the Court's hope that by the time intervenor is accepting applications for his 1979 summer camp, this case will either have been set for trial and tried on the merits, or the rule in question will have been voluntarily amended by UIL. The Court, however, encourages intervenor to seek preliminary injunctive relief, if by the time he is prepared to register applicants for his 1979 camp this controversy has not been resolved.

Scope of Relief

This case is not a class action. Intervenor, although he had shown a probability of success on the merits, is not

entitled to injunctive relief because he has shown no irreparable injury at the present time. The only relief to be granted in this Court's current decree is that defendants be restrained from enforcing the UIL rule as to Greg Kite in the event Greg Kite elects to attend basketball camps for two weeks during the summer of August 1978. This Court's decision on the request for preliminary injunction should not be construed to grant more extensive relief than the narrow relief granted. This decree which this Court contemplates will afford relief only to Greg Kite and his parents. The decree should so specify.

Security

In compliance with Rule 65(c), Fed. R. Civ. Proc., plaintiffs, as a condition of injunctive relief, will be required to post an undertaking in the amount of $50.00 to protect the defendants from any loss or damages which the defendants may incur in the event they have been wrongfully enjoined. In this connection, this Court sets this nominal security in the belief that no harm is inflicted upon the defendants by the enforcement of this preliminary injunction.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
UNIT A

NO. 80-1847

ROBERT KITE, as next friend of GREG KITE,
Plaintiff

DEL HARRIS, as next friend of LARRY HARRIS,
ET. AL.,
Intervenors-Appellees,

versus

BAILEY MARSHALL, Individually and as Director,
University Interscholastic League, ET. AL.,
Defendants-Appellants.
ROBERT H. LACKNER, Individually and as next
friend of MARK LACKNER,
Plaintiff-Appellee,

versus

BAILEY MARSHALL, Individually and as Director,
University Interscholastic League, ET. AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11/20/81, 5 Cir., 198__, ____F.2d____).
(December 23, 1981)

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Before BROWN, GEWIN** and POLITZ, Circuit Judges.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge

** Due to his death on May 15, 1981, Judge Gewin did not participate in this decision; the case was decided by a quorum. 28 U.S.C. § 46(d).

APPENDIX E

CONSTITUTION OF THE UNITED STATES

AMENDMENT ONE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT NINE

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

AMENDMENT FOURTEEN

Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

STATUTES

28 U.S.C. Sec. 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. Sec. 1343(a)(3):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. Sec. 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. Sec. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

Article VIII, Section 21 of the Constitution and Contest Rules for the University Interscholastic League is as follows:

Training camps forbidden—any student who attends a special athletic training camp in football, basketball or volleyball, shall be ineligible for a period of one year from the date he enrolls in the camp for any athletic contest in the League. This does not apply to bona fide summer camps giving an overall activity program to the campers or students.

Opposition

Supreme Court, U.S.
FILED
MAY 22 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2006

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ROBERT KITE, AS NEXT FRIEND OF GREG KITE, AND DEL HARRIS, INDIVIDUALLY AND AS NEXT FRIEND OF LARRY HARRIS AND ALEX HARRIS,

Petitioners,

VS.

BAILEY MARSHALL AND THE UNIVERSITY INTERSCHOLASTIC LEAGUE,

Respondents.

BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

PAUL R. GAVIA
Chief, State and County Affairs

ROBERT W. GAUSS
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys For Respondents

QUESTION PRESENTED

May the public high schools of Texas determine the criteria for representation of the school in varsity interscholastic athletics?

PARTIES TO THE PRECEDING

The Petitioners are:

Del Harris
Larry Harris
Alex Harris

The Respondents are:

Bailey Marshall
The University Interscholastic League

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NO. 81-2006

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ROBERT KITE, AS NEXT FRIEND OF GREG KITE, AND DEL HARRIS, INDIVIDUALLY AND AS NEXT FRIEND OF LARRY HARRIS AND ALEX HARRIS,

Petitioners,

VS.

BAILEY MARSHALL AND THE UNIVERSITY INTERSCHOLASTIC LEAGUE,

Respondents.

BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COME NOW Bailey Marshall and The University Interscholastic League who file their Brief in Opposition to the Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing the decision of the district court is reported at 661 F.2d 1027 (5th Cir. 1981).

JURISDICTION

Respondents challenge the jurisdiction of this

Honorable Court, in that no case or controversy exists, the issues having become moot.

This lawsuit was originally brought by Robert Kite, individually and on behalf of his son, Greg Kite, in the District Court for the Southern District of Texas. Subsequently, certain interventions were allowed, including that of Del Harris, individually and on behalf of his two minor sons, Larry and Alex. A separate lawsuit was brought by Robert Lackner, individually and on behalf of his son, Mark. Preliminary injuctions were granted to Kite and Harris by one district court; a preliminary injunction was granted in favor of Lackner in another district court. The two causes were consolidated and, after a trial on the merits, the District Court for the Southern District of Texas, Houston Division, entered a declatory judgment to the effect that the "summer camp rule" of the University Interscholastic League (UIL) violated the United States Constitution.

The district court dismissed the Kite lawsuit, holding that, as to the Kites, the lawsuit had become moot. The UIL appealed from the decision of the district court insofar as Harris and Lackner were concerned; no appeal was perfected from that part of the decision which dismissed Kite.

The Court of Appeals for the Fifth Circuit reversed the District court (661 F.2d 1027); Lackner has not challenged the decision of the Fifth Circuit, and is not before this Court. The only petitioner for writ of certiorari in this action is Harris.

At the time the Harris intervention was filed in the district court in the summer of 1979, Larry Harris was 16 years old and began his junior year (11th grade) in September, 1979; Alex was 15 years old and began his sophomore (10th grade) year in September of 1979. Larry graduated from high school in May, 1981, render-

ing this lawsuit moot as to him at the time. Alex matriculated to the 8th grade in September, 1977.

Alex is scheduled to graduate from high school in May, 1982. Alex, if he graduates on schedule, will be ineligible to represent his high school during the 1982-83 school year since he will not be enrolled in high school; if he fails to graduate on schedule, he will be ineligible under the five year rule which provides that a student loses his eligibility five years after his matriculation into eighth grade.

Therefore, there is no viable petitioner. Kite was dismissed at the district court level; Lackner has not petitioned for certiorari; and both Harris boys have become ineligible to represent their school in interscholastic competition by virtue of rules completely aside and apart from the "summer camp rule".

An actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *Roe V. Wade*, 410 U.S. 113 (1973); *SEC V. Medical Committee for Human Rights*, 404 U.S. 403 (1972); *Golden V. Zwickler*, 394 U.S. 103 (1969; *U.S. V. Munswingwear, Inc.*, 340 U.S. 36 (1950).

QUESTIONS PRESENTED

Aside from the question of jurisdiction, the real question presented here is this: May the public high schools of Texas determine the criteria for representation of the school in varsity interscholastic athletics?

RULE INVOLVED

Article VIII, Section 21, of the Constitution and Contest Rules of the University Interscholastic League provides as follows:

> Any student who attends a special athletic training camp in football, basketball, or volleyball shall be ineligible for a period of one (1) year from date he enrolls in the camp in the sport or sports for which he attended the camp. This does not apply to *bona fide* summer camps giving an overall activity program to the participants.

STATEMENT OF THE CASE

The UIL is a voluntary association of public high schools in Texas. Schools which elect to become members of the UIL agree, with each other, to compete against other member schools in some activities, including athletics. The schools agree, with each other, to utilize, as representatives of the school, only people who meet certain specified eligibility criteria. For instance, a representative of the school must be enrolled in the school, must achieve certain scholastic requirements, must be an amatuer, must not be over a certain age, must have matriculated into the 8th grade within five years, and must not have received special training, during the immediately preceding summer, in specified athletic activities. The entire thrust of the interscholastic athletic program is to equalize, as nearly as possible, the competition. Small schools compete against small schools; after entering the 8th grade, a student exhausts his eligibility five years thereafter, and students who have participated at the professional level may not compete against amateurs.

It was in this spirit of attempting to equalize, as nearly as possible, the competition, that the summer camp rule was agreed upon by the member schools, thereby seeking to prevent an undue advantage to be gained by students who were fortunate enough to obtain this specialized athletic training during the summer.

This was not a class action.

REASONS WHY THE WRIT SHOULD BE DENIED

A.

MOOTNESS

The writ should be denied for the reason that the controversy has become moot; there is no viable case or controversy; this reason has been argued under the "Jurisdiction" caption.

B.

THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT OPINION AND OPINIONS OF THIS COURT.

The right of privacy has never, as far as Respondent can determine, been articulated by this Court as a "Family Choice Doctrine". None of the cases cited by Petitioner can be analogized to eligibility criteria mutually agreed upon by the member schools of the UIL. Unlike the early cases of this Court, cited by Petitioner, the summer camp rule imposes no requirements on parents. The rule provides for a complete freedom of choice—the parent may elect to send or not to send the child to a specialized athletic training camp. If the parent elects to send, he does it with full knowledge of the consequences that the child may not represent his school the following year in varsity interscholastic competition. No contention is made by Petitioner that participation in interscholastic athletics is a constitutional right, and, indeed, it is not. The fact is that we *are* dealing, here, with the participation by a high school student in interscholastic athletics. No matter how hard they try, Petitioners cannot successfully establish that the parent is deprived of his choice to enroll his child in a

specialized athletic training camp. It is submitted that *Meyer V. Nebraska*, 262 U.S. 390 (1923) and *Pierce V. Society of Sisters*, 268 U.S. 510 (1925) would be more apropos if a parent were required to enroll his child in a specialized training camp in order to establish eligibility.

In spite of the language quoted from *Prince V. Commonwealth of Massachusetts*, 321 U.S. 158 (1944) that case stands for the proposition that parental control is not absolute. *Griswold V. State of Connecticut*, 381 U.S. 479 (1965) involved a statute which made it a criminal offense to use birth contraceptives. By comparison, in the case at bench, we have a rule which imposes, as a condition of eligibility, a prohibition of specialized athletic training during the summer. No invasion of the private bedroom is contemplated in order to enforce the rule in question, nor is there any invasion of privacy which even remotely approaches *Griswald.*

Likewise, *NAACP V. State of Alabama*, 357 U.S. 449 (1958) reveals no conflict. Since the rule in question does not purport, in any way, to restrict the free choice of the parent to send his child to a summer camp, it is difficult to see how the freedom of association in *NAACP V. Alabama* comes into play.

C.

THE FIFTH CIRCUIT PROPERLY APPLIED THE RATIONAL BASIS TEST.

Conspicuous by its absence in the Petition for Certiorari is *Walsh V. Lousisiana High School Athletic Association*, 616 F.2d 152, CA 5 (1980), *cert. den.* 101 S.Ct. 939 (1981). In *Walsh* an identical sanction for violation of an eligibility rule was under attack; that rule provided that if a student transferred out of his home district to another school, that student must wait one

year before being eligible to represent his school. The facts giving rise to the necessity of transferring out of the home district arose out of the free exercise of religion. Petitioner does not argue that the prenumbral right of privacy, under the First Amendment, rises above the express constitutional right of Freedom of Exercise of Religion. In *Walsh*, as here, the right to participate in interscholastic athletics was the issue, and the Fifth Circuit held that whatever incumberance was inflicted upon the First Amendment was indirect and of no great significance. Certiorari was denied by this Court.

The Fifth Circuit correctly isolated the legal questions posed as: (1) whether parents possess a fundamental right to send their children to summer athletic camps; and (2) whether the children have a constitutional right to attend such activities. Petitioner seeks certiorari based on the abstract proposition that the parent has a fundamental right to educate his child. While this abstraction is inarguable, as per *Meyer* and *Pierce*, cited by Petitioner, the right does not extend to the details of the choice, as is illustrated in *Prince V. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, this Court distinguished, without abrogating, both *Meyer* and *Pierce*. To argue that the choice of the details of a child's education is beyond regulation is to argue that the schools are powerless to make rules.

What has been so glibly denominated as a "doctrine" of family privacy derives from *Griswold V. Connecticut*, 381 U.S. 479 (1965) and *Roe V. Wade*, 410 U.S. 113 (1973). *Griswold* held that the use of birth contraceptives in the marital bedroom constituted a familial privacy right which was beyond the reach of the regulatory arm of the state. In *Roe V. Wade*, this Court held that the decision of whether to carry a pregnancy to full term or whether to terminate the pregnancy by induced abortion was a decision so personal and so private

that it was beyond the regulatory powers of the state. It is submitted that the leap from the rationale of these decisions to a "doctrine" of family privacy which would include a decision of whether or not to send a child to a specialized athletic training camp is nothing short of incredible.

No appellate case is known wherein it has been decided that participation in interscholastic athletics is a fundamental right. The Court of Appeals for the Eighth Circuit has recently decided a series of cases appealed from various federal district courts in the State of Missouri. A copy of this opinion is attached as Appendix A. The Eighth Circuit cases involve the penumbral right of freedom of travel. It was there held that the rule's minimal impact on interstate travel does not require strict scrutiny, just as it was held by the Fifth Circuit that the minimal impact on religious practice, in *Walsh*, did not require strict scrutiny.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the opinion of the Court of Appeals for the Fifth Circuit is correct, and for the reasons set out in this brief.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

PAUL R. GAVIA
Chief, State and County Affairs

ROBERT W. GAUSS
Assistant Attorney General
Bar No. 07769000

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

CERTIFICATE OF SERVICE

I, Robert W. Gauss, Assitant Attorney General of Texas do hereby certify that a true and correct copy of Respondents' Brief in Opposition has been served upon counsel for the Petitioners by placing same in the United States Mail, certified, return receipt requested, addressed to Mr. Howard L. Nations, 3000 Post Oak Boulevard, Suite 1480, Houston, Texas 77056 on this the 19 day of May, 1982

Robert W. Gauss

Appendix

Nos. 81-1433, 81-1439, 81-1526, 81-1527, 81-1976, and 82-1132

No.81-1433

In re: United States ex rel. Missouri State High School Activities Association, a voluntary, not-for-profit, unincorporated association,	*	On petition for writ of Prohibition or Alternative Application For Stay of Order or Injunction Pending Appeal.
Petitioner,	*	

No. 81-1439

William A. Zander III, by his next friend Judith R. Champ	*	Appeal from the United States District Court for the Eastern District of Missouri
Appellee,	*	
v.	*	
Missouri State High School Activities Association, (MSHSAA),	*	
Appellant.	*	

No 81-1526

Julie Ann Barnhorst, by her Parent and Legal Guardian, Marcella Barnhorst,	*	Appealfrom the United States District Court for the Western District of Missouri
Appellee,	*	
v.	*	
Missouri State High School Activities Association,	*	
Appellant,	*	

Sunset Hill School;	*	
H. John Stander.	*	
No. 81-1527		
Julie Ann Barnhorst, by her	*	Appeal from the United States
Parent and Legal Guardian,	*	District Court for the
Marcella Barnhorst,	*	Western District of Missouri.
	*	
Appellee,	*	
v.	*	
	*	
Missouri State High School	*	
Activities Association;	*	
Sunset Hill School;	*	
H. John Stander,	*	
	*	
The ABC League,	*	
	*	
Appellant,	*	
No. 81-1976		
In re: United States ex rel.	*	On petition for Writ of
Missouri State High School	*	Prohibition for Alternative
Activities Association, a	*	Application for Stay of Order
voluntary, not-for-profit,	*	of Injunction Pending Appeal.
unincorporated association,	*	
	*	
Petitioner.	*	
No- 82-1132		
The ABC League, a voluntary	*	Appeal from the United States
unincorporated association,	*	District Court for the
and Andrew T. Nelson, a minor,	*	Eastern District of Missouri
by his next friend, his	*	
father, Richard T. Nelson,	*	
	*	
Appellees,	*	
v.	*	
	*	

Missouri State High School Activities Association, a voluntary unincorporated association,

Appellant.

Submitted: March 8, 1982

Filed: April 22, 1982

Before LAY, Chief Judge, ROSS and McMILLIAN, Circuit Judges.

LAY, Chief Judge.

The basic question presented is whether a rule of the Missouri State High School Activities Association (MSHSAA) barring a student's participation in interscholastic athletics for a period of one year after the student transfers for one high school to another violates the federal Constitution. We hold that it does not.

Facts.

The Missouri State High School Activities Association is a voluntary, nonprofit, unincorporated association of high schools whose purpose is the regulation of interscholastic activities including sports, speech, debate, and music. MSHSAA is comprised primarily of public schools although many parochial and nonsectarian private schools are also members of the association.

The transfer rule applies only to athletics. Article VIII, section 8 of the MSHSSA constitution provides, "Students who transfer for reasons other than promotion are ineligible for 365 days." Section 8 creates a number of exceptions to this rule, most importantly, transfers accompanied by a corresponding change of residence of the student's parents and transfers ordered by the board of education or made necessary by school reorganization or closing.[1]

Prior to July 1, 1981 an exception was also provided for students attending schools in the ABC League.[2] The ABC League is an association of private schools in the St. Louis area containing four denominational and two nondenominational schools. The six schools schedule sports competition among themselves on three levels determined by grade, age, height, and weight of the athletes. Because several of the ABC League schools

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1. A hardship exception is defined in article VII, section 10 providing:

> The Board of Control is authorized to grant eligibility to a student in a case that is beyond the control of a student or his (her) parents, which in the opinion of the Board involves undue hardship or an emergency and does not violate the intent of any of the standards of eligibility. Cases involving any choice on the part of the student or parents shall not be heard under this section.

2. The exception provided:

> The ABC League, consisting of St. Louis County Day School, John Burroughs School, The Principia, Lutheran High School North, Lutheran High School South, and the Priory School, shall not be governed by the eligibility rules of Articles VII and VIII in competition with private schools, except that which has an effect on ratings for state football playoffs. It shall be governed by the standards under Article VII and VIII in all competition with other MSHSAA schools.

have no physical education program and require all their students to participate in interscholastic athletics and because the League had traditionally been self-regulating, the League was granted a partial exemption from the transfer rule. However, during the course of this litigation, MSHSSA repealed this exemption effective July 1, 1981.

Three actions are consolidated in this appeal. In *Zander v. Missouri State High School Activities Association*, No. 81-0369-C(1) (E.D. Mo. April 7, 1981), Chief Judge H. Kenneth Wangelin enjoined MSHSAA from preventing William A. Zander, III, from participating in interscholastic tennis competition during the spring of 1981 after Zander transferred to a Missouri high school fro a school in Florida. The Association's appeal from this order (No. 891-1439) is consolidated with review of this court's grant of a stay pending appeal (No. 81-1433). Zander did not take any role in the appeal. The parties concede that his individual claim is moot.

In *Barnhorst v. Missouri State High School Activities Association*, 504 F. Supp. 449 (W.D. Mo. 1980), Judge Russell G. Clark refused to issue a preliminary injunction barring application of the transfer rule to prevent Julie Anne Barnhorst from participating in athletics during the 1980-81 school year. The court held the rule did not violate the due process or equal protection clauses of the fourteenth amendment.

Barnhorst subsequently conducted additional discovery and amended her complaint to claim that the transfer rule as modified by the ABC League exemption deprived her of equal protection of the law. (Barnhorst did not transfer to or from an ABC League School). The court held that the exemption created discrimination between students which had no rational basis and thus violated the equal protection clause. However, the

court found that the proper remedy was not the invalidation of the transfer rule, but rather the striking of the exemption. The court held the exemption unconstitutional and enjoined its application. *Barnhorst v. Missouri State High School activities Association*, No. 80-1036-CV-W-4-3 (W.D. Mo. April 8, 1981). MSHSAA appealed (No. 81-1526).

On May 4, 1981, the ABC League moved to intervene in the *Barnhorst* case. The court allowed intervention for purposes of appeal, but refused to reconsider its order. *Barnhorst v. Missouri State High School Activities Association*, No. 80-1036-CV-W-4-3 (W.D. Mo. May 7, 1981). The League appealed (No. 81-1527). Because of the subsequent repeal of the ABC exemption, [3] the court's ruling as the the constitutionality of the exemption is moot. Barnhorst did not participate in the appeal. The parties concede that her individual claim is moot.

The final case consolidated in this appeal is *ABC League v. Missouri State High School Activities Association*, No. 81-0608-C(1) (E.D. Mo. Dec. 23, 1981). In this case, the ABC League and Andrew T. Nelson, a transferee to an ABC League school interested in participating in interscholastic sports throughout the 1981-82 school year, filed suit against MSHSAA alleging that repeal of the ABC exemption and the transfer rule itself were unconstitutional. Judge Wangelin enjoined enforcement of the repeal and declared the transfer rule unconstitutional. In order to maintain a uniform policy in relation to the stay earlier granted in *Zander*, this court stayed execution of the *ABC League*

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3. During pendency of *Barnhorst, MSHSAA began to consider repeal of the ABC exemption. Prior to the decision in Barnhorst,* the Association's Board of Control decided to submit the issue of repeal to themember schools. The schools voted to remove the exemption effective July 1, 1981.

order pending appeal. MSHSAA's appeal of Judge Wangelin's order (No. 82-1132) is consolidated with review of this court's stay of the order pending appeal (No. 81-1976).[4]

Issues.

The issues presented on appeal concern the constitutionality of the transfer rule, the constitutionaliy of the application of the transfer rule to those schools formerly exempt under the ABC exemption, and the legality of the district court's decision to enjoin repeal of the ABC exemption.[5]

Transfer Rule

The ABC League and the individual students challenge the transfer rule on both equal protection and due process grounds. Because MSHSAA is an association comprised primarily of public schools, its rules are state action governed by the fourteenth amendment. However, federal courts have uniformly upheld comparable rules governing transfers against challenges based on both the due process and equal protection clauses. *See Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 159-61 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121

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4. This court also requested that the district court stay the implementation of any further orders concerning these issues in other cases, pending resolution of this appeal.

5. Various parties raise procedural issues relevant to review of the decisions in *Zander* and *Barnhorst*. Because we consider the individual claims raised in these two cases to be moot and because repeal of the ABC exemption likewise made the ABC League's appeal of the *Barnhorst* decision moot, we need not discuss these issues.

(3d Cir. 1978); *Hamilton v. Tennessee Secondary School Athletic Association*, 552 F.2d 681 (6th Cir. 1976); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976) (New Mexico); *Oklahoma High School Athletic Association v. Bray*, 321 F.2d 269 (10th Cir. 1963) (residency requirement); *Kulovitz v. Illinois High School Association*, 462 F. Supp. 875 (N.D. Ill. 1978); *Dallam v. Cumberland Valley School District*, 391 F. Supp. 358 (M.D. Pa. 1975); *Paschal v. Perdue*, 320 F. Supp. 1274 (S.D. Fla. 1970).

Equal Protection

Participation in interscholastic athletics is an important part of the educational process. Nontheless, education has not been deemed a fundamental right under the fourteenth amendment requiring application of strict judicial scrutiny. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-39 (1973).

Plaintiffs argue that the transfer rule burdens their exercixe of the fundamental right to travel interstate and restricts their freedom to associate. When a student alters his or her place of residence from one state to another without an accompanying change by his or her parents (as did Zander), the rule prohibits the student from participating in interscholastic athletics for one year. Classifications which penalize the exercise of the right to travel are subject to strict scrutiny. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). But most cases which implicate the rule's sanction do not involve interstate travel and, those which do, implicate the sanction because they involve school transfers and not because they involve interstate travel. The rule's minimal inpact on interstate travel does not require strict scrutiny.

Plaintiffs also argue the rule burdens the exercise of the right to freely associate by penalizing student's choice to change schools and thus to alter the body of

people with which they associate. Students have no indefeasible right to associate through choice of school. Mandatory assignment to public schools based on place of residence or other factors is clearly permissible. The transfer rule does not prevent association through private schooling nor discriminate against such association. Thus no right is burdened and the rule is not thereby subject to strict scrutiny.

Finally, plaintiff ABC League argues the rule burdens students' and parents' exercise of their right to choose and devise a nonpublic education. As discussed below, the rule does not impinge on this limited right.

Plaintiffs challenge the transfer rule as being both under-inclusive and over-inclusive. The rule is claimed to be under-inclusive because it does not apply to nonatletic activities. Since athletics are not a suspect class and no fundamental right is impinged by applying the rule to athletics and not to other school activities, the standard of judicial scrutiny which should be applied is the rational relationship test. *Dandridge v. Williams*, 397 U.S. 471, 458-87 (1970); *Williamson v. Lee Opitical Co.*, 348 U.S. 483 (1955). A rational basis clearly exists for believing that the danger of incurring the harms involved in transfers motivated by athletics and attempts to induce such transfers is greater that the danger of parallel harms in other areas.

The transfer rule is claimed to be over-inclusive because it reaches many transfers which do not involve the harms it is designed to prevent. The rule does not, however, create and inherently suspect classification. Thus, as indicated, the rule need only be rationally related to a legitimate state purpose. The clear purpose of the rule is to prevent the evils associated with recruiting of high school athletes and transfers motivated by athletics. School officials urge the administrative difficulties and political pressures en-

countered in determining on an individual basis which transfers involve the feared evils justify the rule's prophylactic nature. *Weinberger v. Salfi*, 422 U.S. 749, 784-85 (1975). We must agree. As observed in *Dandridge v. Williams*, 397 U.S. at 485, "If the classification has som 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" Once a rational relationship exists, and it exists here, judicial scrutiny must cease. Whether the rule is wise or creates undue individual hardship are policy decisions better left to legislative and administrative bodies. Schools themselves are by far the better agencies to devise rules and restrictions governing extracurricular activities.[6] Judicial intervention in school policy should always be reduced to a minimum.

Due Process

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6. The Missouri Court of Appeals' eloquent statement in a 1973 dispute over MSHSAA's summer camp rule is strong evidence that the Missouri state courts adhere to the same view. The court in *Art Gaines Baseball Camp, Inc. v. Houston*, 500 S.W.2d 735, 740-41 (Mo. App. 1973) (footnotes omitted) statedz:

> Along with entrusting the education of our children to teachers and administrators, we also entrust the control and supervision of the extracurricular activities incident to that education. Implicit in the responsibility for these activities is the power to make reasonable rules and regulations. We are dealing here with numerous school who have voluntarily joined an association. As members of this association, they may, by majority vote, enact rules to govern theri interaction. It is obvious that chaos would result without such rules. It is also obvious that the members are in the most advantageous position to appreciate the regulations under which they must act to achieve desired goals. A court should not interfere with the enactment of those regulations as long as they are reasonable and do not infringe on public policy or law.

Plaintiffs also argue the rule violates the due process clause. Our equal protection analysis reveals that the rule is not arbitrary.[7] The Association's bylaws, section 10.1, provide for notice and hearings before both the executive secretary and the Board of Control concerning eligibility determinations. The specified procedures combined with the availability of application under the

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7. Plaintiffs also urge the promotion and hardship exceptions are arbitrary. Article VIII, section 7 of the MSHSAA constitution provides:

> a. A student promoted from the sixth grade to the seventh grade may be eligible immediately at the school of his or her choice.
>
> b. A student promoted from the eighth grade, or the highest grade of a junior high school administered as a unit within the school system, may be eligible immediately at the school of his or her choice.
>
> c. Students completing the highest grade in an elementary school that is not a part of a system supporting a high school may be eligible immediately in the school of their choice. Any succeeding transfer of enrollment shall be governed by the transfer of enrollment standards.

The promotion exception recognizes that schools divide grades into different groups and evinces a reasoned judgment that transfers after completion of one of these units (e.g., junior high, whether a particular school defines it to include ninth grade or not) are more often unrelated to athletics than mid-unit transfers and that all transfers are less harmful between units. *See Barnhorst*, 504 F. Supp. at 462-63.

Plaintiffs also attack the hardship exception, *see* note 1 *supra*, as arbitrary. However, the exception does contain one clear standard which greatly narrows it scope. The exception can only be invoked in cases involving no choice by the student or his or her parents (thus it could not have been invoked in any of the individual cases involved in this appeal). The Board of Control has a very narrow ambit of discretion which is constitutionally acceptable.

hardship exception satisfy any procedural due process requirements.[8]

ABC League Exemption.

As noted above, the constitutionality of the ABC League exemption is no longer before this court. After repeal of the exemption, the League may only argue that the transfer rule cannot constitutionally be applied to students transferring to or between its schools. The League argues that individuals have a constitutional right—derived from the first and fourteenth amendments—to choose to educate their children in private schools and to devise the curriculum of those schools without state interference. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (establishment clause); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (due process); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same). The fourteenth amendment prevents states from prohibiting attendance of nonpublic schools, but it does not preclude reasonable, nondiscriminatory regulation designed to advance legitimate, secular interests. *Board of Education v. Allen*, 392 U.S. 236, 245-47 (1968); *Pierce*, 268 U.S. at 534; *Windsor Park Baptist Church v. Arkansas Activities Association*, 658 F.2d 618, 621 (8th Cir. 1981).

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8. In *Walsh*, the Fifth Circuit held:

> The due process clause of the fourteenth amendment extends constitutional protection to those fudnamental aspects of life, liberty, and property that rise to the level of a "legitimate claim of entitlement" but does not protect lesser interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement. As decided in *Mitchell, it falls "outside the protection of due process."*

616 F.2d at 159-60.

The transfer rule is a reasonable and neutral regulation. It does not burden the choice of private education, but merely attaches a restriction to all transfers whether to private or public schools except those falling into a specified exception. The ABC League argues that participation in interscholastic sports is an integral element of its vision of private education. The League makes no claim that this philosophy is rooted in religious practices and thus its claim is not cognizable under *Yoder*, 406 U.S. 205, nor can the League demonstrate that the rule represents a fundamental restriction of liberty as was the compulsion of public educaiton in *Pierce*, 268 U.S. 510, and the ban of instruction in a foreign language involved in *Meyer*, 262 U.S. 390. The League may constitutionally be required to choose between conforming to the transfer rule or foregoing athletic competition with the members of MSHSAA.[9] We find the rule may constitutionally be applied to stuidents transferring to schools in the ABC League.[10]

Since we find no violation of the federal Constitution, all stary orders are dissolved (Nos. 81-1433 and 81-1976). We reverse the district court's decision in *ABC League* (No. 82-1132) with directions to enter judgment in favor of MSHSAA, and to vacate the orders in Nos. 81-1439, 81-1526, and 81-1527 with directions to

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9. *The ABC schools are voluntary* members of MSHSAA and agreed in their individual membership applications to uphold the standards of the Association. *See* MSHSAA constitution at III, § 1.

10. MSHSAA argues that Judge Wangelin's order in *ABC League* enjoining implementation of the repeal of the exemption constituted an abuse of the court's equitable powers and a usurpation of legislative authority. Because we find the transfer rule may be applied to all schools, including those in the ABC League, we need not review this claim.

the district courts to dismiss each of these cases for lack of jurisdiction since they are now moot.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.